No. 15023

United States Court of Appeals
For the Ninth Circuit

AMEROCEAN STEAMSHIP COMPANY, INC., a corporation,
and
BLACKCHESTER LINES, INC., a corporation,
Appellants,

vs.

ALBERT W. COPP, JR., as Executor under the Last Will and Testament of Albert W. Copp, deceased,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDWARD S. FRANKLIN,
Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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INDEX

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BRIEF OF APPELLEE

STATEMENT OF ISSUES

Libelant brought this action for damages for unseaworthiness as the result of injuries sustained by him in Seattle, Washington, August 16, 1954, when he slipped on the oily and greasy deck of the S.S. AMEROCEAN. Libelant was employed by Albert W. Copp, doing business as Northwest Ship Repair Co.

Respondent shipowner impleaded Copp under Admiralty Rule 56, seeking indemnity. Prior to the trial of the case, and with appellee's approval, appellant settled the personal injury claim for Twelve Thousand Five Hundred Dollars ($12,500) (Tr. 42, Findings of Fact No. VI).

In the trial of the indemnity action below, appellant stipulated in open court that the deck of the AMER-

OCEAN upon which libelant slipped was in an unseaworthy condition and it had breached its non-delegable duty to provide libelant with a safe place to work (Findings of Fact VII, Tr. 42).

The District Court held that both appellant shipowner and appellee ship repairer were negligent and dismissed appellant's third party petition for indemnity (Tr. 52).

The court said in part in its decision:

> " * * * The slipperiness caused by the oil spread upon the deck by employees of the ship was just as active at the time of the accident as it was when the oil was first applied. At the moment of the occurrence of the accident, the negligence of the third party respondent was in all respects active. It necessarily follows that the negligence of the ship in creating and permitting to continue the fish oil slippery deck was concurrent with such negligence of the third party respondent, who by continuing the work with the knowledge of the slippery condition of the deck, continued the active effect of the third party respondent's negligence. * * * "

Appellant shipowner appeals from denial of its indemnity claim to this court.

COUNTER-STATEMENT OF FACTS

The steamship AMEROCEAN, owned by appellant, left Japan early in August, 1954, bound for Seattle where it was to be laid up. About August 13, 1954, en route, Chief Mate O'Neill ordered that the port side of the deck be fish-oiled (Tr. 90). Foggy and rainy weather was thereafter encountered, so when the vessel reached

Seattle the fish oil on the port side had not dried, making this portion of the deck very slippery (Tr. 99).

Employees of appellee Northwest Ship Repair Co. came aboard the AMEROCEAN the morning of the vessel's arrival, August 16, 1954, at 8:30 A.M. to remove grain fittings in the holds and do other work incidental to the lay up of the ship (Tr. 98) which fact was known to the officers of the AMEROCEAN. It had rained that morning at 7:00 A.M. No work had been done by appellee's employees that morning on the port side of the vessel, except between 11:00 A.M. and 11:30 A.M. appellee's foreman, Houlton, visited the port side of the vessel near No. 1 hatch to secure a barge. He observed the slippery condition of the deck in this area and slipped himself on the deck (Tr. 72).

Houlton immediately went to the first mate's room (Tr. 73) to have the ship correct the hazardous condition of the deck. He testified as follows:

> "It was at that time that I went to the first mate's room and talked to some one that was in there—whether he was the first mate or not, I do not know — as to the existing condition and it should be taken care." (Tr. 73)
>
> * * * Q. You say on that occasion that you requested sawdust.
>
> A. Yes, sir." (Tr. 75)
>
> * * * Q. Did you talk to the officer in the First Mate's quarters?
>
> A. I talked to a given person that was in there.
>
> Q. And what did you say to him?
>
> A. I said the deck was very slippery, and if it was possible, we would like sawdust to plant

around on the deck, so we could navigate and walk around on it.

Q. What did this officer say in reply?

A. He said, 'We'll get some.' " (Tr. 79)

This was denied by the mate (Tr. 96).

At this time the vessel was in the course of paying off. Everything on the vessel was in a state of confusion and Houlton testified that there was a lot of evidence of "partying around" on the vessel (Tr. 74).

ARGUMENT

The finding of the lower court that both appellant and appellee were jointly, concurrently and actively negligent which deprived appellant of its claim for indemnity cannot be set aside unless clearly erroneous.

McAllister v. United States, 348 U.S. 19;

Peterson v. United States (9 C.C.A.) 224 F.2d 748.

Indemnity Claim Precluded by *Halcyon* Case

Prior to the case of *Halcyon Lines v. Haen Ship Ceiling and Refitting Corporation* (1952) 342 U.S. 282, 96 L.ed. 318, 72 S.Ct. 277, the law as to the extent and amount of contribution allowable to a tortfeasor in admiralty in non-collision cases of joint negligence, was a matter of conflict in several circuits. *Halcyon* cited this court's decision in *United States v. Rothschild International Stevedoring Company,* 182 F.2d 322, as one of the conflicting decisions. In *Halcyon, supra,* the relative degrees of fault had been assessed at 25% to the shipowner and 75% to the shipfitter by the jury.

The Supreme Court laid down the rule in *Halcyon,*

supra, that regardless of the degrees of culpability between the tortfeasors, no contribution would be permitted in admiralty in non-collision cases until Congress legislated in the matter.

This court has since followed the *Halcyon* rule in two cases. In *Union Sulphur & Oil Corp. v. W. J. Jones and Son,* 195 F.2d 93 (1952), as in the instant case, indemnity was sought where the negligence of both shipowner and stevedore concurred. It was denied on the basis of *Halcyon, supra.* In that case, the vessel's ladder was unseaworthy because of a defective weld and the stevedore placed excessive strains upon the ladder. In that case the court said:

> " * * * We agree with the district court that upon the facts proven the court properly found that the negligence of Union Sulphur and Jones, Inc., jointly caused the injury to Marshall. Hence our decision in the *Rothschild* case is not applicable.
>
> "The case is governed by the decisions of the Supreme Court in *Halcyon Lines v. Haen Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 72 S.Ct. 277. It reversed the decision in *Baccile v. Halcyon Lines,* 3 Cir., 187 F.2d 403, a case discussed in the briefs of the parties here. * * * "

In *States Steamship Co. v. Rothschild International Stevedoring Company,* 205 F.2d 253 (1953), this court permitted a claim for indemnity to be asserted by the shipowner against the stevedore where the libel alleged that the shipowner's breach of duty to provide a safe place of work for the longshoreman was *solely* caused by the act of the stevedore. The court in its discussion of the *Halcyon* doctrine, and Circuit Judge Healy in a

concurring opinion, pointed out that if the shipowner was culpable in any degree in causing the accident, *Halcyon* would bar his claim for indemnity. This case will be subsequently discussed in detail.

Indemnity Allowable to Shipowner Only Where Shipowner Without Fault

The shipowner owed libelant stevedore the absolute and non-delegable duty to furnish him with a seaworthy ship, *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90 L.ed. 1009; *Pope & Talbot v. Hawn,* 346 U.S. 406, 98 L.ed. 143. In *Sieracki* the shipowner's duty to furnish a seaworthy ship was described as "a species of liability without fault." *If such unseaworthy condition on the vessel was created solely by the negligence of the stevedore employer,* the shipowner would be entitled to indemnity from the stevedore for the technical breach of its duty of seaworthiness caused by the stevedore.

If the joint negligence of the shipowner and stevedore, regardless of degree of culpability, causes a stevedore injury and the shipowner seeks redress, contribution rather than indemnity is involved and no recovery is permissible under the *Halcyon* doctrine.

In *States Steamship Co., supra,* the court said (p. 256):

> "Here it was clearly foreseeable that if the stevedore company made the ship unseaworthy, causing an injury to a stevedore employee, the owner would be liable to the employee for the full amount of his injury under the case of *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1009. The particular injury to the particular plaintiff was foreseeable as the result of the

> stevedore company's negligent actions. Hence, the owner is entitled to be indemnified for this amount by the stevedore. See Rest. Torts §281, comment C."

With reference to the contribution, which is in essence what appellant is seeking in this case, this court in the *States Steamship Co.* case quoted from *Gray v. Boston Gas Light Co.,* 114 Mass. 149 as follows:

> "When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis,* and the damage results from their joint offence. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be liable."

The court in the *States Steamship Co.* case also referred with approval to the holding of the Second Circuit in the case of *American Mutual Insurance Company v. Matthews,* 182 F.2d 322, as illustrative of the basic differences between the right to indemnity and the right of contribution between joint tortfeasors. The *Matthews* case held that since the shipowner joined in the wrongdoing in supplying a defective appliance to the employing stevedore who used it, both parties were equally culpable and the shipowner could obtain no indemnity.

In distinguishing the facts in the *Matthews* case from those in *Rothschild, supra,* the court said:

> "Here we do not have joint tortfeasors, but rather one party who is alleged to be solely at fault and another party who is alleged to be liable without fault as the result of the other's acts." (p. 255)

Parenthetically, there is little difference in the shipowner supplying defective equipment to the stevedore as in the *Matthews* case, *supra,* and knowingly and recklessly furnishing the stevedore with a dangerously slippery deck as in this case. In either instance, the negligent shipowner is not entitled to a bonus or windfall for his palpable breach of duty to the stevedore. Nor under the guise of an indemnity action, can he obtain contribution because of *Halcyon.*

Appellant's stipulation in court conceding its own active negligence in failing to furnish libelant with a seaworthy vessel and the record here adequately establishes the shipowner's breach of duty to the stevedore was not of a technical or passive character, nor an instance of liability without fault. Appellant knowingly and willfully provided libelant with an unsafe place in which to work, and after being notified of the hazardous condition of the deck failed to remedy it. Its negligence was active and continuing, and concurred with the negligence of appellee who failed to warn libelant, in proximately causing libelant's injury. Since under the record, appellant is basically seeking contribution and not indemnity, the lower court properly denied it any relief because of the *Halcyon* and *Union Sulphur & Oil Company* cases, *supra.*

The following cases from other circuits support the lower court's denial of appellant's claim for indemnity.

Slattery v. Mara, 186 F.2d 134 (2 C.C.A.);

Hawn v. Pope & Talbot, 186 F.2d 800 (3 C.C.A.);

Torres v. Castor, 1956 A.M.C. 325 (2 C.C.A.);

Shannon v. U. S., 119 F.Supp. 706 (D.C. N.Y.);

American President Lines v. Marine Terminals Corp., 135 F.Supp. 363 (D.C. N.D., Cal.).

In a parallel factual situation to the case at bar, the United States Supreme Court in the case of *Union Stock Yards v. Chicago, Burlington & Quincy R. R.* (1904) 196 U.S. 217, 49 L.ed. 453, denied indemnity to a terminal company which negligently failed to inspect a car and discover a defective brake which injured its employee, and which car had been delivered to it by a railroad company. In holding both the terminal and railroad companies breached their duty in failing to inspect and no indemnity allowable, the court said:

> " * * * The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of

the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other. * * * "

Cases Cited by Appellant

Neither the cases of *United States v. Arrow Stevedoring Co.,* 175 F.2d 329 (9 C.C.A.), nor *United States v. Rothschild International Stevedoring Company,* 183 F.2d 181 (9 C.C.A.), support appellant's claim for indemnity. Several factors distinguish the *Arrow* case *supra,* from the one at bar. First the court said (p. 331):

"The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle and gear was right there by the hatch for that purpose."

Secondly, the owner (United States) did not have knowledge of the situation, and thirdly, there was an express contract of indemnity. The court held as follows (p. 331):

"On the facts we find that the sole proximate cause of the injury to Williams was the negligence

of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen. * * *

"Arrow's contract with the government provides for its liability to the government for such sole negligence in the following language;

" 'Article 26. Liability and Indemnity (b) The contractor shall be liable to the Government for any loss or damage * * * etc.' "

In *Rothschild, supra,* the shipowner supplied a defective winch, and made unsuccessful attempts to repair it upon the complaints of the stevedore. With knowledge of its defects, the stevedore foreman permitted the continued operation of the defective winch. In the indemnity action, this court attempted to assay the relative degrees of culpability of the vessel owner and stevedore for their joint breaches of duty. It awarded indemnity to the shipowner upon the grounds the stevedore had the last clear chance to have avoided the injury by ordering the winch not to be worked until repaired. This decision was before the United States Supreme Court decision in the *Halcyon* case, and *Halcyon* has established the invalidity of the theory of recovery it promulgated, and over-ruled it. *American President Lines v. Marine Terminals Corp., supra; Union Sulphur & Oil Corp. v. Jones and Son, supra.*

The remaining cases cited in appellant's brief are correct statements of the rule of law that the shipowner is not entitled to claim indemnity where his negligent conduct combines with that of the stevedore in causing

an injury, but only in those cases where the shipowner's breach of its duty to furnish a seaworthy ship was a technical breach, or an instance of liability without fault upon the part of the shipowner.

CONCLUSION

Based upon *Halcyon,* and the prior cases from this circuit, the *Union Sulphur and Oil* and *States Steamship Company* cases, the decree of the lower court denying appellant indemnity was correct, and we respectfully submit should be affirmed.

The rule of law pronounced by these cases effects a sound and useful social policy. It will serve to make the shipowner more vigilant to prevent stevedore accidents due to unseaworthiness or defective ship's gear. By his control of the vessel, the shipowner can eliminate u safe and defective conditions. The stevedore takes the ship and gear as he finds it. His work upon the ship is brief with little or no opportunities for inspection. The shipowner should not be rewarded for being in "pari delicto" with the stevedore.

Respectfully submitted,

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